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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 LEONA T.,

8 Plaintiff,

9 v.

10 COMMISSIONER OF SOCIAL
11 SECURITY,

12 Defendant.

NO: 2:18-CV-0093-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

13 BEFORE THE COURT are the parties' cross-motions for summary
14 judgment (ECF Nos. 13 and 15). This matter was submitted for consideration
15 without oral argument. The Court has reviewed the administrative record and the
16 parties' completed briefing and is fully informed. For the reasons discussed below,
17 the Court **grants** Defendant's motion and **denies** Plaintiff's motion.

18 JURISDICTION

19 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g),
20 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* at 1111. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted).

1 The party appealing the ALJ's decision generally bears the burden of establishing
2 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

3 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

4 A claimant must satisfy two conditions to be considered "disabled" within
5 the meaning of the Social Security Act. First, the claimant must be "unable to
6 engage in any substantial gainful activity by reason of any medically determinable
7 physical or mental impairment which can be expected to result in death or which
8 has lasted or can be expected to last for a continuous period of not less than twelve
9 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant's
10 impairment must be "of such severity that he is not only unable to do his previous
11 work[,] but cannot, considering his age, education, and work experience, engage in
12 any other kind of substantial gainful work which exists in the national economy."
13 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential analysis to
15 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
16 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
17 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
18 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
20 404.1520(b), 416.920(b).

1 If the claimant is not engaged in substantial gainful activities, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
4 claimant suffers from "any impairment or combination of impairments which
5 significantly limits [his or her] physical or mental ability to do basic work
6 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
7 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
8 however, the Commissioner must find that the claimant is not disabled. *Id.*

9 At step three, the Commissioner compares the claimant's impairment to
10 several impairments recognized by the Commissioner to be so severe as to
11 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
12 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
13 severe than one of the enumerated impairments, the Commissioner must find the
14 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

15 If the severity of the claimant's impairment does meet or exceed the severity
16 of the enumerated impairments, the Commissioner must pause to assess the
17 claimant's "residual functional capacity." Residual functional capacity ("RFC"),
18 defined generally as the claimant's ability to perform physical and mental work
19 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
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1 404.1545(a)(1), 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
2 analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv),
6 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
7 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
8 404.1520(f), 416.920(f). If the claimant is incapable of performing such work, the
9 analysis proceeds to step five.

10 At step five, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing other work in the national economy.
12 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
13 the Commissioner must also consider vocational factors such as the claimant's age,
14 education and work experience. *Id.* If the claimant is capable of adjusting to other
15 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
16 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
17 work, the analysis concludes with a finding that the claimant is disabled and is
18 therefore entitled to benefits. *Id.*

19 The claimant bears the burden of proof at steps one through four above.
20 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). If the

1 analysis proceeds to step five, the burden shifts to the Commissioner to establish
2 that (1) the claimant is capable of performing other work; and (2) such work
3 “exists in significant numbers in the national economy.” 20 C.F.R. §§
4 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

5 ALJ’S FINDINGS

6 Plaintiff filed applications for disability insurance benefits and supplemental
7 security income disability benefits on March 4, 2015, alleging a disability onset
8 date of December 19, 2014. Tr. 18. These applications were denied initially and
9 upon reconsideration, and Plaintiff requested a hearing. Tr. 18. A hearing was
10 held before an Administrative Law Judge on October 25, 2016. Tr. 18. The ALJ
11 rendered a decision denying Plaintiff benefits on January 11, 2017. Tr. 15-32.

12 The ALJ found that Plaintiff met the insured status requirements of the
13 Social Security Act through December 31, 2015. Tr. 20. At step one, the ALJ
14 found that Plaintiff had not engaged in substantial gainful activity since December
15 19, 2014, the alleged onset date. Tr. 20. At step two, the ALJ found that Plaintiff
16 has the following severe impairments:

17 major depressive disorder, posttraumatic stress disorder (PTSD), social
18 anxiety disorder, panic disorder, borderline personality disorder, alcohol use
19 disorder, cannabis use disorder, osteoarthritis right knee status post
20 replacement surgery April 4, 2016, obesity, cervical degenerative disc
disease, and degenerative joint disease right shoulder (20 CFR 404.1520(c)
and 416.920(c)).

1 Tr. 20. At step three, the ALJ found that Plaintiff's severe impairments did not
2 meet or medically equal a listed impairment. Tr. 21-22. The ALJ then determined
3 that Plaintiff had the residual functional capacity to:

4 [P]erform light work as defined in 20 CFR 404.1567(b) and 416.967(b) with
5 the following exceptions: she cannot climb ladders, ropes, or scaffolds,
6 kneel, or crawl, and she can occasionally perform all other postural
7 activities; with her right upper extremity, she can only occasionally reach
8 overhead and frequently reach in all other directions; she can have
9 occasional exposure to extreme cold; she can have no exposure to hazards,
10 such as unprotected heights and moving mechanical parts; she is limited to
11 simple, routine, and repetitive task with a reasoning level of 2 or less; she
12 needs a routine and predictable work environment requiring no more than
13 simple decision-making; she can have no contact with the public and only
14 occasional superficial contact with supervisor and coworkers; and she cannot
15 work at an assembly line pace.

16 Tr. 24. At step four, the ALJ found that Plaintiff was unable to perform any past
17 relevant work. Tr. 30. The ALJ then found that (1) Plaintiff is "an individual
18 closely approaching advanced age," (2) Plaintiff "has a limited education and is
19 able to communicate in English[.]" and (3) the "[t]ransferability of job skills is not
20 material to the determination of disability[.]" Tr. 30. The ALJ then found that,
based on Plaintiff's age, education, work experience, and residual functioning
capacity, there are jobs that exist in significant number in the national economy
that the claimant can perform[.]" including garment sorter, mail clerk, and
housekeeping cleaner. TR. 30-31. The ALJ concluded that Plaintiff has not been
under a disability through the date of the decision. Tr. 31. In light of these

1 findings, the ALJ concluded that Plaintiff was not disabled under the Social
2 Security Act and denied her claims on that basis. Tr. 32.

3 The Appeals Council denied Plaintiff's request for review on January 18,
4 2018, Tr. 1-7, making the ALJ's decision the Commissioner's final decision for
5 purposes of judicial review. 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

6 ISSUES

7 Plaintiff raises three issues for review:

- 8 1. Whether the ALJ committed harmful error in rejecting medical
9 opinions;
- 10 2. Whether the ALJ committed harmful error in rejecting Plaintiff's
11 subjective complaints; and
- 12 3. Whether the ALJ erred at step five.¹

13 ECF No. 17 at 3.

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17 ¹ This issue is wholly dependent upon Plaintiff's argument that the ALJ erred
18 in discounting the medical opinion of Dr. Duris, Dr. Crosier, and Dr. Martin.
19 Because the Court disagrees with Plaintiff's argument regarding the medical
20 opinions, the Court need not address this issue.

DISCUSSION

A. Opinions of Treating Sources

There are three types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant’s file] (nonexamining [or reviewing] physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted). Generally, a the opinion of a treating physician carries more weight than the opinion of an examining physician, and the opinion of an examining physician carries more weight than the opinion of a reviewing physician. *Id.* In addition, the Commissioner’s regulations give more weight to opinions that are explained than to opinions that are not, and to the opinions of specialists on matters relating to their area of expertise over the opinions of non-specialists. *Id.* (citations omitted).

If a treating or examining physician’s opinion is uncontradicted, an ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). “If a treating or examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)). Regardless of the source, an ALJ need not accept a

1 physician's opinion that is "brief, conclusory and inadequately supported by
2 clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d at 1228
3 (quotation and citation omitted).

4 1. Opinion of Dr. Duris

5 Dr. Duris diagnosed Plaintiff with major depressive disorder, recurrent,
6 panic disorder without agoraphobia, and borderline personality disorder. Dr. Duris
7 opined that Plaintiff suffers a marked limitation in her ability to (1) adapt to
8 changes in a routine work setting, (2) communicate and perform effectively in a
9 work setting, (3) complete a normal work day and work week without interruptions
10 from psychologically based symptoms, and (4) maintain appropriate behavior in a
11 work setting. Tr. 440. Dr. Duris conducted two mental status examinations with
12 identical results. Under part 1 of the mental status examinations, Dr. Duris
13 observed that Plaintiff (1) appeared adequately groomed and with adequate
14 hygiene, her clothes were appropriate for weather and situation, (2) her speech was
15 normal in terms of amount, productivity, flow and rate, there was no evidence of
16 pressured, slurred stuttering or halting in her speech pattern, (3) she presented as
17 generally open, cooperative, and relatively genuine in her responses, (4) her mood
18 was generally depressed, and (5) affective expression was labile. Tr. 385, 441.
19 Under part 2, Dr. Duris indicated Plaintiff was within normal limits in all
20 categories: (1) thought process and content, (2) orientation, (3) perception, (4)

1 memory, (5) fund of knowledge, concentration, (6) abstract thought, and (7) insight
2 and judgment. Tr. 385-86, 442.

3 The ALJ “gave little weight to the Department of Social and Health Services
4 evaluations by Mark Duris, Ph.D., completed on May 6, 2014 and March 3, 2015.”
5 Tr. 19. Among other things, the ALJ reasonably found that the opinion of Dr.
6 Duris that Plaintiff has moderate to marked functional limitations is not consistent
7 with normal mental status examination results reported by Dr. Duris. Tr. 19.
8 Accordingly, the Court finds that the ALJ did not commit reversible error in
9 discounting the opinion. *Bayliss v. Barnhart*, 427 F.3d at 1216 (inconsistency
10 within physician’s records is a clear and convincing reason for discounting the
11 opinion); *see Bray*, 554 F.3d at 1228 (an ALJ need not accept a physician’s
12 opinion that is “brief, conclusory and inadequately supported by clinical
13 findings.”). Moreover, the ALJ properly discounted the opinion of Dr. Duris
14 because his opinion was not based on a complete record, as Plaintiff falsely denied
15 a history of drug and alcohol use when reporting to Dr. Duris. *See McFeely v.*
16 *Colvin*, 2014 WL 2918552, at *2 (E.D. Wis. June 27, 2014). The failure to report

1 the substance abuse is not trivial given other medical opinions suggest Plaintiff's
2 symptoms may be related, at least in part, to her substance use.²

3 2. Dr. Crosier

4 Dr. Jonathan P. Crosier treated Plaintiff when she was admitted to the
5 emergency room after she slipped and fell the night before. Dr. Crosier observed
6 that Plaintiff was in moderate discomfort and had a slow deliberate gait with
7 normal station. Tr. 833. Dr. Crosier determined she had a back strain and
8 prescribed 12 tablets of Norco 5/325 mg as needed for pain and 30 tablets for
9 Flexeril for muscle spasms. He recommended Plaintiff "keep active, but avoid
10 aggressive activity such as running, jumping, or heavy lifting." Tr. 833.

11 Plaintiff appears to argue that the ALJ erred in finding that Dr. Crosier's
12 exam finding were benign. ECF No. 13 at 13. Plaintiff's entire argument on this
13 point follows:

14 The ALJ asserted that Dr. Crosier's exam findings were benign. (Tr. 21).
15 However, Dr. Crosier's objective findings included decreased range of
motion of her spine, tenderness of muscles in the low back, and muscle

16 ² At the hearing, Dr. Marian F. Martin testified that because Dr. Duris was not
17 aware of the substance abuse, "it raises questions about whether or not all of those
18 symptoms that he listed that meet the diagnostic criteria for depression would still
19 be considered as symptoms of depression if the substance use was take into
20 account." Tr. 65.

1 tension. He prescribed pain medication. (Tr. 833). Thus, his examination
2 results indicated a legitimate complaint of back pain.

3 ECF No. 13 at 13. The ALJ did not commit reversible error. First, the ALJ's
4 conclusion that the results of the examination are benign is an observation about
5 the findings of Dr. Martin that is reviewed for substantial evidence; the ALJ does
6 not specifically discount the opinion of Dr. Martin. Even if Plaintiff is correct that
7 the examination demonstrates Plaintiff has a "legitimate complaint of back pain,"
8 Plaintiff must prove the back pain causes more than minimal limitations to
9 Plaintiff's ability to perform work activity to be considered a severe impairment.
10 Plaintiff has not argued this point. Nor has Plaintiff explained how the back pain
11 limited Plaintiff in a manner more severe than what is accounted for in the RFC.
12 Moreover, the complained of back pain was caused by a fall, and Plaintiff does not
13 argue the symptoms continued.³ Plaintiff has thus not met her burden of showing
14 the ALJ committed harmful error. *See Shinseki*, 556 U.S. at 409-10.

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18 ³ Notably, Plaintiff was told to follow up with her primary care provider if
19 symptoms continued, Tr 841, but Plaintiff does not point to any record showing the
20 pain continued.

1 3. Dr. Martin

2 Dr. Marian F. Martin provided expert testimony at the hearing. Tr. 47.
3 During an extensive back and forth regarding the potential and documented effects
4 of Plaintiff's substance abuse, Dr. Martin opined that Plaintiff would have a
5 marked limitation in concentration, persistence and pace[,]” reasoning: “based on
6 my experience and research, I don't think somebody who's using marijuana daily
7 and alcohol a few times a week or on weekends is going to make it to work on any
8 kind of regular basis.” Tr. 60. The ALJ inquired whether “there's any specific
9 affirmative evidence in this file that suggest she's ever actually experienced that
10 degree of limitation in concentration, persistence and pace, even while, you know,
11 abusing substances.” Tr. 62. Dr. Martin could not point to any evidence. See Tr.
12 62.

13 Plaintiff argues that the ALJ erred in rejecting Dr. Martin's opinion that
14 Plaintiff would have occasional absenteeism. ECF No. 13 at 13. The ALJ rejected
15 the opinion of Dr. Martin only as to his opinion that Plaintiff would have
16 occasional absenteeism because of marijuana use. Tr. 28. The ALJ correctly
17 found that this was merely an opinion based on general experience, rather than the
18 medical evidence in the record. TR. 28-29. An ALJ may reject an opinion that is
19 unsupported by clinical findings. *Bayliss*, 427 F.3d at 1216. As such, the ALJ did
20 not err in discounting the opinion of Dr. Martin.

B. Adverse Credibility Determination

In social security proceedings, a claimant must prove the existence of physical or mental impairment with “medical evidence consisting of signs, symptoms, and laboratory findings.” 20 C.F.R. §§ 416.908; 416.927. A claimant’s statements about his or her symptoms alone will not suffice. 20 C.F.R. §§ 416.908; 416.927. Once an impairment has been proven to exist, the claimant need not offer further medical evidence to substantiate the alleged severity of his or her symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (en banc). As long as the impairment “could reasonably be expected to produce [the] symptoms,” the claimant may offer a subjective evaluation as to the severity of the impairment. *Id.* This rule recognizes that the severity of a claimant’s symptoms “cannot be objectively verified or measured.” *Id.* at 347 (quotation and citation omitted).

If an ALJ finds the claimant’s subjective assessment unreliable, “the ALJ must make a credibility determination with findings sufficiently specific to permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant’s testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). In making this determination, the ALJ may consider, *inter alia*: (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the claimant’s testimony or between his testimony and his conduct; (3) the claimant’s daily living activities; (4) the

1 claimant's work record; and (5) testimony from physicians or third parties
2 concerning the nature, severity, and effect of the claimant's condition. *Id.* If there
3 is no evidence of malingering, the ALJ's reasons for discrediting the claimant's
4 testimony must be "specific, clear and convincing." *Chaudhry v. Astrue*, 688 F.3d
5 661, 672 (9th Cir. 2012) (quotation and citation omitted). The ALJ "must
6 specifically identify the testimony she or he finds not to be credible and must
7 explain what evidence undermines the testimony." *Holohan*, 246 F.3d at 1208.

8 The ALJ did not err in finding Plaintiff was not entirely credible. The ALJ
9 found several inconsistencies between Plaintiff's alleged limitations and her actual
10 conduct, and otherwise found her claimed symptoms were not supported by the
11 record. These are clear and convincing reasons for discounting Plaintiff's
12 credibility, and are supported by substantial evidence. First, Plaintiff's alleged
13 limitations were not consistent with the ALJ's own observation at the hearing.
14 Plaintiff testified that she could sit for only 20 minutes at a time, yet – as the ALJ
15 observed – she did not stand for an hour during the hearing, and only stood up after
16 the ALJ pointed out that Plaintiff had been sitting for an hour. Tr. 25. Plaintiff
17 testified that it was unusual for her to sit for that long, and that she stood up only
18 after receiving confirmation that she was free to stand up if necessary, and that she
19 was experiencing pain as a result of sitting for so long. ECF No. 13 at 16.
20 However, the ALJ specifically told the Plaintiff at the beginning of the hearing: "I

1 want you to please try to relax. I want you to make yourself as comfortable as you
2 can, and do whatever you need to do throughout the hearing to keep yourself
3 comfortable[.]” Tr. 41. Second, the ALJ found an inconsistency between
4 Plaintiff’s testimony and the record regarding her church attendance,⁴ which is
5 significant given the alleged severity of Plaintiff’s social limitations (at the
6 hearing, Plaintiff alleged she only attended once because there are too many
7 people). Tr. 25. Third, the ALJ found that Plaintiff’s activities of daily living –
8 including gardening, household chores, going to the library, food bank, grocery
9 store, church, and Bible study groups – undermine the claimant’s symptom
10 allegations. Tr. 28. For example, Plaintiff indicated that she did not spend time
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12 ⁴ The ALJ found Plaintiff’s testimony – that she had only been to church once
13 and Bible study once since the alleged onset date – was not consistent with the
14 record. Tr. 28; *compare* Tr. 85 (Plaintiff testifying that she has “gone to church
15 once and Bible study once), *with* TR. 726 (February 24, 2016: Plaintiff reported
16 that she had attended a women’s bible study group), Tr. 732 (March 14, 2016:
17 “Plaintiff “reports that she has been attending church study groups each week and
18 she went to church once.”), *and* Tr. 84 (testimony on October 25, 2016: Plaintiff
19 admitting she went to church “about a month ago”).
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1 with others and did not go anywhere on a regular basis, Tr. 287, yet she admitted
2 she was “making friends with her neighbors and trying to expand her social
3 network[,]” had “been attending church study groups each week[,]” Tr. 732, and
4 had kept in contact with women from her church and her pastor for support after
5 her knee surgery, Tr. 737. *See also* Tr. 749 (“CSS praised and discussed ongoing
6 support from church group, friends and family”). Finally, the ALJ observed that,
7 despite Plaintiff’s testimony that “she stays in bed three to four days if she is
8 depressed and this happens every two to three months” and suffers from panic
9 attacks that cause “heart palpations, sweating, shaking, crying, diarrhea, and
10 vomiting[,]” Tr. 25, Plaintiff “did not report to treatment providers that she stayed
11 in bed three to four days every two to three months, nor did she report symptoms
12 of vomiting and diarrhea from anxiety approximately every three months[,]” Tr.
13 27.

14 Whether viewed in terms of inconsistency or a change in Plaintiff’s ability to
15 cope with others, the ALJ did not err in finding Plaintiff alleged limitations were
16 inconsistent with the record. An observed contradiction between the Plaintiff’s
17 claimed symptoms and actual ability is a clear and convincing reason to find
18 Plaintiff not entirely credible. Moreover, Plaintiff does not even attempt to argue
19 how, if erroneous, the finding that Plaintiff is not entirely credible caused any
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1 harmful error. The Plaintiff has thus failed to meet her burden. *See Shinseki*, 556
2 U.S. at 409-10.

3 **IT IS HEREBY ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment (ECF No. 13) is **DENIED**.

5 2. Defendant's Motion for Summary Judgment (ECF No. 15) is

6 **GRANTED.**

7 The District Court Executive is hereby directed to file this Order, enter
8 Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

9 **DATED** January 16, 2019.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE

Chief United States District Judge